Mohamad Hairi bin Mohamad Isa v Allianz General Insurance Co (M) Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-411–08 OF 2018
NANTHA BALAN J
26 NOVEMBER 2018

Road Traffic — Insurance — Judgment against insured by third party — Plaintiff involved in accident — Plaintiff wished to enforce judgment against defendant as insurer — Defendant obtained declaratory order that insurance policy issued by them to insured party void and unenforceable — Plaintiff sought to set aside declaratory order — Defendant applied to strike out plaintiff's application — Whether notice served on plaintiff — Whether plaintiff precluded from setting aside declaratory order — Whether statutory provision complied with — Whether declaratory order null and void — Road Transport Act 1987 s 96

The plaintiff was a motorcyclist who was injured in a motor vehicle accident involving another motorcycle. The plaintiff filed a running down suit and obtained judgment against the other motorcyclist in the Selayang Sessions Court. He wished to enforce the judgment against the insurers of the other motorcycle pursuant to s 96(1) of the Road Transport Act 1987 ('the RTA'). However, the insurers via an originating summons ('OS227') obtained a declaration pursuant to s 96(3) of the RTA that the insurance policy for the other motorcycle was void and unenforceable. The plaintiff via encl 1 sought to set aside the declaration that was obtained by the insurers. Essentially, the application was premised on the fact that service of the notice on the plaintiff's solicitors who acted for him in the running down action, did not constitute service on him as required under s 96(3) of the RTA. On the other hand, via encl 5, the defendant had applied under O 18 r 19(1)(a) or (1)(d) of the Rules of Court 2012 and/or under the inherent jurisdiction of the court to strike out the application as disclosing no cause of action and/or as being an abuse of process. The defendant contended that s 96(3) of the RTA had been complied with and specifically that service of the notice under s 96(3) of the RTA on the plaintiff's solicitors was sufficient. Alternatively, it was argued that the plaintiff had knowledge of OS227 and failed to intervene in OS227. The defendant further contended that there had been considerate delay on the plaintiff's part in applying to set aside the declaratory order. The defendant also contended that the non-compliance of s 96(3) of the RTA was not a serious statutory violation and that the fact that the plaintiff was aware of OS227 sufficed to preclude the plaintiff from applying to set aside the declaratory order.

Held, granting order in terms of encl 1 and striking off encl 5:

(1) Since the s 96(3) notice was only served on the plaintiff's solicitors, it followed that there was no separate service on the plaintiff as required by s 96(3) of the RTA read with s 118 of the RTA. Therefore, a contravention of written law and the declaratory order in OS277 was consequently a nullity. The insurers plea that the plaintiff's solicitors and by extension, the plaintiff, had 'knowledge' of the s 96(3) notice and was aware of the declaratory order, could not be relied upon as a basis to preclude the plaintiff from challenging the validity of the declaratory order. The plea of estoppel could not likewise be taken against an order which was a nullity and/or one which was made without jurisdiction. Estoppel, acquiescence or waiver, did not and could not operate when there was a lack of jurisdiction (see paras 48–50).

(2) There was delay on the plaintiff's part in seeking to impugn the declaratory order but delay was merely a building block for a plea of 'waiver', which did not and could not preclude the plaintiff from applying to set aside the impugned declaratory order (see para 54).

(3) Given that a declaration under s 96(3) of the RTA would result in very serious financial and/or adverse consequences to the injured party particularly if that party ends up with a 'paper judgment', it could not be said that the requirement for service on the plaintiff, was a mere matter of procedure. It may properly be described as a procedural provision which affected substantive rights of a third party. Hence, service under s 96(3) of the RTA in the manner as prescribed in s 118 of the RTA was mandatory and it would not suffice if the statutory notice was given to the plaintiff's solicitors who may ordinarily, be the 'agent' of their client. The defendant was obliged to take the prescribed route of effecting service of the s 96(3) notice on the plaintiff in the manner prescribed by s 118 of the RTA (see paras 55–57).

(4) It was imperative and axiomatic that s 96(3) of the RTA, which allowed the insurer to obtain a declaration which deprived the plaintiff of a statutory right to seek payment of a judgment under s 96(1) of the RTA, be fully and strictly complied with. Since there was non-compliance with the statutory provision, the declaratory order was null and void (see para 61).

[Bahasa Malaysia summary

Plaintif adalah seorang penunggang motosikal yang cedera dalam kemalangan yang melibatkan motosikal lain. Plaintif memfailkan guaman pelanggaran dan mendapatkan penghakiman terhadap penunggang motosikal lain di Mahkamah Sesyen Selayang. Dia ingin menguatkuasakan penghakiman terhadap penanggung insurans motosikal lain menurut s 96(1) Akta Pengangkutan Jalan 1987 ('Akta'). Walau bagaimanapun, syarikat insurans melalui saman pemula ('OS227') memperoleh perisytiharan menurut s 96(3)

A Akta bahawa dasar insurans untuk motosikal lain adalah tidak sah dan tidak boleh dikuatkuasakan. Plaintif menerusi lampiran 1 memohon untuk mengetepikan perisytiharan yang diperoleh oleh penanggung insurans. Pada dasarnya, permohonan itu didasarkan pada hakikat bahawa penyampaian notis kepada peguam plaintif yang bertindak untuknya dalam tindakan B pelanggaran, bukan merupakan penyampaian kepadanya sebagaimana yang dikehendaki di bawah s 96(3) Akta. Sebaliknya, melalui lampiran 5, defendan telah memohon di bawah A 18 k 19(1)(a) atau (d) Kaedah-Kaedah Mahkamah 2012 dan/atau di bawah bidang kuasa sedia ada oleh mahkamah untuk membatalkan permohonan itu kerana tiada kausa tindakan dan/atau kerana C penyalahgunaan proses. Defendan berpendapat bahawa s 96(3) Akta telah dipatuhi dan khususnya penyampaian notis di bawah s 96(3) Akta kepada peguam plaintif adalah mencukupi. Sebagai alternatif, ia telah dihujahkan bahawa plaintif mempunyai pengetahuan tentang OS227 dan gagal campur tangan dalam OS227. Defendan selanjutnya berpendapat bahawa terdapat D penangguhan yang serius terhadap bahagian plaintif dalam memohon untuk mengetepikan perintah pengisytiharan itu. Defendan juga berpendapat bahawa ketidakpatuhan s 96(3) Akta bukan merupakan pelanggaran undang-undang yang serius dan fakta bahawa plaintif menyedari OS227 E memadai untuk menghalang plaintif daripada memohon untuk mengetepikan perintah pengisytiharan itu.

Diputuskan, membenarkan perintah berkenaan lampiran 1 dan membatalkan lampiran 5:

F (1) Oleh kerana notis 96(3) hanya disampaikan kepada peguam plaintif, ia diikuti bahawa tiada penyampaian berasingan pada plaintif sebagaimana yang dikehendaki oleh s 96(3) Akta yang dibaca dengan s 118 Akta. Oleh itu, pelanggaran undang-undang bertulis dan perintah pengisytiharan G dalam OS277 sebagai akibatnya adalah pembatalan. Penanggung insurans menyatakan bahawa peguam plaintif dan plaintif yang mempunyai 'pengetahuan' mengenai notis s 96(3) dan menyedari perintah pengisytiharan itu, tidak boleh digunakan sebagai asas untuk menghalang plaintif daripada mencabar kesahan perintah H pengisytiharan. Estopel juga tidak boleh diambil terhadap suatu perintah yang merupakan pembatalan dan/atau satu yang dibuat tanpa bidang kuasa. Estopel, persetujuan atau penepian, tidak dan tidak boleh beroperasi apabila terdapat kekurangan bidang kuasa (lihat perenggan 48–50).

I (2) Terdapat kelewatan pada pihak plaintif dalam usaha untuk menghalang perintah pengisytiharan tetapi kelewatan hanyalah sekatan untuk mendapatkan pengakuan 'penepian', yang tidak dan tidak boleh menghalang plaintif daripada memohon untuk mengetepikan perintah perisytiharan yang dipersoalkan (lihat perenggan 54).

(3) Memandangkan perisytiharan di bawah s 96(3) Akta akan menyebabkan kesan kewangan serius dan/atau buruk kepada pihak yang tercedera terutamanya jika pihak itu berakhir dengan 'penghakiman atas keAktas', tidak dapat dikatakan bahawa keperluan untuk penyampaian kepada plaintif, adalah perkara biasa. Ia boleh digambarkan dengan tepat sebagai peruntukan prosedur yang mempengaruhi hak-hak substantif pihak ketiga. Oleh itu, penyampaian di bawah s 96(3) Akta mengikut cara yang ditetapkan dalam s 118 Akta adalah mandatori dan tidak akan mencukupi sekiranya notis statutori diberikan kepada peguam plaintif yang biasanya boleh menjadi 'ejen' klien mereka. Defendan diwajibkan untuk mengambil laluan yang ditetapkan untuk melaksanakan penyampaian s 96(3) notis kepada plaintif mengikut cara yang ditetapkan oleh s 118 Akta (lihat perenggan 55–57).

(4) Adalah mustahak dan nyata bahawa s 96(3) Akta, yang membenarkan penanggung insurans untuk mendapatkan perisytiharan yang menghalang plaintif hak statutori untuk mendapatkan bayaran penghakiman di bawah s 96(1) Akta, sepenuhnya dan tegas dipatuhi. Oleh kerana tidak mematuhi peruntukan undang-undang, perintah pengisytiharan adalah batal dan tidak sah (lihat perenggan 61).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Gobi a/l Loganathan v Allianz General Insurance Company (M) Bhd [2017] MLJU 2105; [2017] 1 LNS 2075, HC (refd)

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404, SC (refd)

Khoo Cheng Yee v Khoo Teng Seong & Ng Seng Kiok & Ors. [1992] 2 CLJ Rep 643; [1992] 4 CLJ 2140, HC (refd)

Nana Ofori Atta II v Nana Abu Bonsra II [1958] AC 95; [1957] 3 All ER 559; [1957] 3 WLR 830 PC (refd)

Puran Singh v Kehar Singh & Anor [1939] 1 MLJ 71 (refd)

Veetak Enterprise Sdn Bhd v Kuala Lumpur Finance Berhad [1987] 1 MLJ 407 (refd)

Legislation referred to

Road Transport Act 1987 ss 96, 96(1), (3), 118
Rules of Court 2012 O 18 r 19(1)(a), (1)(d)
Subordinate Courts Act 1948 ss 65(1)(a), 90

Harjinder Singh (G Dorai & Co) for the plaintiff.
R Ratha (SG Lingam & Co) for the defendant.

Nantha Balan J:

INTRODUCTION

[1] The plaintiff in this originating summons is a motorcyclist who was injured in a motor vehicle accident involving another motorcycle. The plaintiff filed a running down suit and obtained judgment against the other motorcyclist in the Selayang Sessions Court. He wishes to enforce the judgment against the insurers of the other motorcycle pursuant to s 96(1) of the Road Transport Act 1987 ('the RTA'). However, the insurers pre-emptively made an application to the High Court by way of an earlier originating summons and obtained a declaration pursuant to s 96(3) of the RTA that the insurance policy for the other motorcycle is void and unenforceable. The effect of this declaration is that the plaintiff will not be able to enforce the judgment against the insurers. The plaintiff's only recourse is to enforce the judgment against the motorcyclist, who may or may not be able to satisfy the judgment.

[2] The plaintiff contends that under s 96(3) of the RTA, notice should be given to the plaintiff to notify him that the insurer of the other motor-vehicle has made an application to the court to declare the motor-vehicle policy as void or unenforceable. The plaintiff contends that s 96(3) of the RTA should be strictly complied with and that the notice should be served on the plaintiff in the manner as prescribed by s 118 of the RTA. In this case, the plaintiff contends that notice under s 96(3) of the RTA was not served on him. Instead, the notice was served on the plaintiff's solicitors who were handling the running-down action. Hence, it is contended that there was non-compliance with the provisions of written law and that the declaratory order is therefore null and void. The plaintiff now seeks to set aside the declaration that was obtained by the insurers in the earlier proceedings. Essentially, the present application is premised on the fact that service of the notice on the plaintiff's solicitors who acted for him in the running down action, does not constitute service on him as required under s 96(3) of the RTA.

SECTION 96 OF THE ROAD TRANSPORT ACT 1987

[3] Section 96 of the RTA reads as follows:

96 Duty of insurers to satisfy judgments against persons insured in respect of third party risks

(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or

cancelled the policy, *the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments*.

(2) No sum shall be payable by an insurer under subsection (1) —

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings;

(b) in respect of any judgment, so long as execution is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either —

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) *No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:*

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, *he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely,* and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

(5) In this section, the expression 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risks, and if so at what premium and on what conditions, and the expression 'liability covered by the terms of the policy' means a liability but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(6) In this Part, reference to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy. (Emphasis added.)

MOTOR-VEHICLE ACCIDENTS — ENFORCING THE JUDGMENT AGAINST THE INSURER

[4] It is quite apparent from statistics and news articles that there is a high incidence of accidents on Malaysian roads and the majority of motor accidents involve motorcyclists who are at great risk of being seriously injured or killed in these accidents.

[5] For those who have suffered the misfortune of being injured or killed in motor accidents, the recourse for the injured party or for the dependants of the deceased person, would be to initiate legal action in negligence against the tortfeasors/wrongdoers for damages. Damages would include pain and suffering, loss of amenities, nursing care, nursing assistance, loss of earnings and special damages, and in the case of death, loss of dependency and bereavement.

[6] In a legal claim for loss and damage due to injuries or death, it is critical that the motor-vehicles which were involved or contributed to the occurrence of the accident be identified so that their respective insurers can be traced and notices under s 96(1) of the RTA issued to the insurers upon the commencement of legal action against the insured. In most accidents, the identity of the motor-vehicle(s) which is/are involved would be known. In some cases, especially the 'hit and run' type accident, if there is no eye-witness and no police report by the motorist, the injured party will not know the identity of the motorist who had fled the scene. This type of situation where the identity of the motor-vehicle is unknown may give rise to fraudulent claims that motor-insurers may face. The claim against the insurer is fraudulent because the insured motor-vehicle was not at all involved in the accident. But through nefarious means, the insured motor-vehicle becomes 'involved' in the accident and thereby exposes the insurer to massive judgment sums which are statutorily payable per s 96(1) of the RTA.

[7] As mentioned earlier, there could well have been an accident but not involving the insured motor-vehicle. However, where the victim is not aware of the identity of the tort-feasor's motor-vehicle, certain parties with vested financial interest may step in and creatively find a party who is willing to lodge a false police report to state that the insured motor-vehicle was involved in the accident. Thus, the fraud occurs when the insured (or rider/driver) is approached and 'persuaded' to 'assist' the victim by falsely stating that the insured motor-vehicle was involved in the accident. This is elaborated further in the judgment.

[8] However, if there was a genuine accident which involved the insured motor-vehicle and liability is established against the insured or the insured's authorised driver/rider in the running down action, then any judgment (regardless of the amount) which is obtained by the victim of a road accident against the insured or the rider/driver will, pursuant to s 96(1) of the RTA, be payable by the insurer. It is relevant to mention here that a claimant may file a claim in the magistrate court or in the sessions court depending on the value of the claim. Thus, a motor accident claim that is estimated to be RM100,000 or less may, pursuant to s 90 of the Subordinate Courts Act 1948 (Revised 1972), be filed in the magistrate court. And any claim beyond RM100,000 may be filed in the sessions court *which has unlimited jurisdiction* to try all actions and suits of a civil nature in respect of motor vehicle accidents. See s 65(1)(a) of the Subordinate Courts Act 1948 (Revised 1972).

[9] Thus, although the statutory monetary limit of the sessions court for civil cases is RM1m, it can grant judgment for *any amount* in respect of a claim arising out of a motor vehicle accident. Thus, the monetary jurisdiction of the sessions court for motor accident cases is 'open-ended' and 'limitless'. assuming the statutory pre-requisite of serving a notice on the insurer either before or within seven days of commencement of the action, then, once a judgment in the running down suit is obtained, all that the plaintiff needs to do is to serve it on the insurer and demand for payment. The insurer will then have to pay the judgment sum pursuant to s 96(1) of the RTA. Section 96(1) of the RTA may therefore be regarded as a statutory 'boon' to the victims of road accidents as they need not look to the tortfeasor for payment, but will instead look to the insurer for payment of the judgment sum.

FRAUD ON INSURERS

[10] Whilst s 96(1) of the RTA imposes a statutory obligation to pay on any judgment that is obtained against their insured, it is equally important to note that under s 96(3) of the RTA, the insurer may pre-emptively make an application to the court for a declaration that the policy of insurance is void or unenforceable and thereby avoid liability to pay in respect of any judgment that

may be obtained against the insured. However, s 96(3) of the RTA does not stipulate the circumstances under which an application may be made to declare the policy as void or unenforceable.

[11] But typically, the insurer's application under s 96(3) of the RTA would be based on the assertion that there is 'fraud' involving the insured and the victim of the motor-vehicle accident. The fraud in this context, stems from the insurer's allegation that the insured (or the authorised driver/rider) has colluded with the plaintiff in the running down action by dishonestly implicating the insured motor-vehicle in the accident. This type of fraud usually takes place when the victim of the accident does not know the identity of the opposite motor-vehicle which collided into him. This is when the 'fixers', 'touts' and other 'nefarious' intermediaries intervene and persuade the insured (usually by payment of a monetary sum) to lodge a police report to state (falsely) that the insured motor-vehicle was involved in the accident.

[12] By this fraudulent route, the victim will be assured of payment of the judgment sum by virtue of s 96(1) of the RTA, albeit that the insured motor vehicle was not involved in the accident. It is only when the purported claim is subsequently investigated by the insurance company that it would be discovered that the insured had lodged a false police report. In some instances, the insurance adjuster may be able to persuade the insured to tell the truth and obtain a statutory declaration from the insured to state that the insured motor-vehicle was not involved in the accident. Thereafter the adjuster would get the insured to lodge another police report to retract the insured's earlier report which (falsely) implicated the insured motor-vehicle as being involved in the accident.

[13] Once the insurer is satisfied that there was fraud, then based on information elicited by the adjusters and the declaration procured from the insured, the application for a declaration will be made under s 96(3) of the RTA to declare the policy as void or unenforceable. Quite clearly, if the declaration under s 96(3) of the RTA is granted, then it will have serious financial consequences to the plaintiff in the running-down action as it would mean that the judgment may turn out to be a 'paper-judgment' depending on whether the defendant in the running-down action has the means to pay the judgment sum. Section 96(3) of the RTA which enables an insurer to avoid liability to pay on any judgment, cannot therefore be construed as a mere procedural or adjectival provision. Rather, it is an important statutory provision which will result in ruinous consequences to the affected party. It is therefore axiomatic that it should be strictly complied with.

[14] Further, it is imperative that the declaration be obtained before liability (in the running-down action) is established against the insured. Hence, if the

declaratory order under s 96(3) of the RTA is made *after* the judgment is given in the running-down action, then it would not enable the insurer to avoid liability to pay on the judgment sum that was obtained against their insured or against the authorised driver/rider. Hence, timing is important for purposes of s 96(3) of the RTA.

THE ORIGINATING SUMMONS

[15] The present application is an originating summons dated 15 August 2018 (encl 1) ('this OS') to *set aside* the declaratory order dated 26 August 2016 ('the declaratory order') which was obtained by the defendant in Originating Summons No WA-24NCC-227–05 of 2016 ('OS227').

[16] In this OS, the plaintiff is also seeking an order that the declaratory order be deemed unenforceable against the plaintiff vis a vis the plaintiff's claim arising out of an accident which occurred on 13 December 2014 involving the plaintiff's motorcycle No MBS 2604 and motorcycle No WTJ 894 ('the insured motorcycle'), which was insured by the defendant at the material time via Policy No 14VKP055926 for the period from 2 October 2014–1 October 2015 ('the policy').

[17] The plaintiff also seeks a consequential order that he is entitled to enforce the judgment dated 22 December 2016 granted in Selayang Sessions Court Suit No A53KJ-436–09 of 2015 ('Suit 436') against the defendant, as the insurer of motorcycle No WTJ 894 pursuant to s 96(1) of the RTA and that the defendant, as the insurer of motorcycle No WTJ 894, is statutorily liable to effect payment of the judgment sum which was obtained by the plaintiff in Suit 436.

[18] On the other hand, via encl 5, the defendant has applied under O 18 r 19(1)(a) or (1)(d) of the Rules of Court 2012 and/or under the inherent jurisdiction of this court to strike out this OS as disclosing no cause of action and/or as being an abuse of process. The defendant contends that s 96(3) of the RTA has been complied with and specifically that service of the notice under s 96(3) of the RTA on the plaintiff's solicitors is sufficient.

[19] Alternatively, it is argued that the plaintiff had knowledge of OS227 and failed to intervene in OS227. The defendant further contends that there has been considerate delay on the plaintiff's part in applying to set aside the declaratory order. The defendant also contends that the non-compliance of s 96(3) of the RTA (if any) is not a serious statutory violation and that the fact that the plaintiff was aware of OS227 suffices to preclude the plaintiff from applying to set aside the declaratory order.

A THE PLAINTIFF'S COMPLAINT

[20] The thrust of the plaintiff's complaint in this OS is that the application that was made by the defendant in OS227 and the declaratory order that was obtained thereunder, is a *nullity* as there was a clear contravention of a statutory provision, namely s 96(3) of the RTA which required the notice of the application via OS227 to be served on the plaintiff in accordance with the mode of service as prescribed by s 118 of the RTA.

[21] The crux of the plaintiff's complaint is that the notice under s 96(3) of the RTA ('s 96(3) Notice') was served on the *plaintiff's solicitors* who were handling Suit 436 and that there was *no service on the plaintiff*. As such, it is contended by the plaintiff that the declaratory order is a nullity as it was contrary to written law and therefore made without jurisdiction.

[22] The plaintiff asserts that there was contravention of written law and relies on the Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC) ('Badiaddin's case') to set aside the declaratory order. The plaintiff also relies on the decision of the High Court in *Gobi a/l Loganathan v Allianz General Insurance Company (M) Bhd* [2017] MLJU 2105; [2017] 1 LNS 2075 (HC) ('Gobi's case'), which dealt with the same point and which was subsequently upheld by the Court of Appeal by an Order dated 26 March 2018 in Civil Appeal No W-02(NCC)(W)-1765–08 of 2017.

THE ACCIDENT

[23] The facts of the accident are as follows. On 13 December 2014, the plaintiff, who was riding motorcycle No MBS 2604 was involved in a road accident. It is alleged that there was a collision between the plaintiff's motorcycle and the insured motorcycle. The purported rider of the insured motorcycle was Mohamad Farid bin Mohamad Nazeri ('Farid').

[24] The accident occurred along Jalan Sungai Pusu, Gombak Kuala Lumpur ('the accident'). Farid lodged a police report (Rpt No GOMBAK/000745/15) dated 14 December 2014 stating that he was riding the insured motorcycle and that he was involved in the accident with an unknown motorcycle on 13 December 2014. As a result of the accident, the plaintiff suffered severe injuries. The plaintiff appointed Messrs G Dorai & Co ('GDCo') to initiate a claim against Farid as the rider and owner of motorcycle No WTJ 894. On 7 September 2015, the plaintiff filed a writ and statement of claim against Farid at the Selayang Sessions Court via Suit 436. The present defendant, as Farid's insurers, appointed Messrs Kanaga Suresh & Co ('KSCo') to represent Farid, who was named as the defendant in Suit 436.

DISCOVERY OF FRAUD

[25] The defendant appointed adjusters to investigate the purported claim and they found that there were elements of fraud. The insurance adjusters found that Farid (as the insured rider of the motorcycle) was in fact *not involved in the accident*. Farid later lodged a police report on 12 April 2016 stating that the *insured motorcycle was not involved in the accident*. In that police report Farid stated:

> PADA 12/4/2016 JAM LEBIH KURANG 5.30 PETANG SAYA TELAH DIDATANGI OLEH PENYELASAS KERUGIAN PIHAK INSURAN KENDERAAN M/SIKAL SAYA WTJ894 DAN BERTANYA TENTANG PENGLIBATAN M/SIKAL SAYA DI DALAM SATU KEMALANGAN JALAN RAYA PADA TARIKH DAN WAKTU YANG TERTERA DI DALAM LAPORAN POLIS TRAFIK GOMBAK/000745/15 DAN *SAYA TELAH MENGAKU BAHAWA SEBENARNYA SAYA TIDAK LANGSUNG TERLIBAT DIDALAM KEMALANGAN TERSEBUT*. LAPORAN TERSEBUT DISURUH BUAT OLEH SEORANG KENALAN SAYA KERANA *INGIN MEMBANTU KAWAN BELIAU UNTUK MEMBUAT TUNTUTAN PALSU DARI PIHAK INSURAN YANG MELINDUNGI KENDERAAN SAYA IAITU ALLIANZ.* SAYA YANG TIDAK ARIF TENTANG UNDANG-UNDANG TELAH MEMBUAT LAPORAN PENGLIBATAN SAYA DIDALAM KEMALANGAN TERSEBUT. SETELAH BERFIKIR PANJANG SAYA TIDAK MAHU PERKARA TERSEBUT DITERUSKAN. SAYA DATANG KE BALAI TANPA DESAKAN ATAU PAKSAAN DARI MANA-MANA PIHAK UNTUK MEMBUAT REPOT AM UNTUK MELINDUNGI DIRI SAYA SUPAYA PERKARA TIDAK BERBANGKIT DI KEMUDIAN HARI. SAYA DATANG KE BALAI POLIS SETAPAK BUAT LAPORAN POLIS. SEKIAN LAPORAN SAYA. (Emphasis added.)

[26] About FOUR months after KSC had filed the defence, the defendant appointed Messrs SG Lingam & Co ('SGLCo') to file an application to intervene in Suit 436 on the grounds that there were elements of *fraud* pertaining to the accident. On 10 June, 2016, the sessions court allowed the defendant's application to intervene. The defendant herein, was then named as the two defendant in Suit 436. I turn now to OS227.

OS227

[27] The defendant instructed SGLCo to file OS227 for a declaration pursuant to s 96(3) of the RTA for an order to declare the policy as null and void. OS227 was filed on 23 May 2016. The defendant's grounds for seeking the declaratory order are to be gleaned from the following paragraphs of the affidavit of one Shamini a/p Deventhiran affirmed on 19 May 2016, which reads as:

> 6. Berdasarkan fakta-fakta di atas, Pemohon telah melantik Penyelaras untuk

menyiasat mengenai kemalangan tersebut. Penyiasatan Penyelaras menunjukkan bahawa Responden dan motorsikal tersebut yang dikatakan ditunggang oleh Responden tidak terlibat dalam kemalangan tersebut. Responden telah membuat satu laporan polis pada 12.04.2016 menyatakan di antara lain, seperti berikut:

(i) Mengakui bahawa sebenarnya Responden tidak terlibat dalam kemalangan tersebut;

(ii) Laporan polis penglibatan disuruh buat oleh seorang kenalan Responden kerana ingin membantu kawan beliau membuat tuntutan palsu dari pihak insuran yang melindungi kenderaan Responden iaitu Allianz; dan

(iii) Responden yang tidak arif tentang undang-undang telah membuat laporan penglibatan Responden di dalam kemalangan tersebut,

(*Sesalinan laporan polis tersebut dilampirkan di sini dan ditandakan sebagai 'Ekshibit AGIC-6'*)

7. Saya dinasihati oleh Peguamcara Pemohon dan dengan sesungguhnya percaya berdasarkan kontrak insuran tersebut, pihak Responden adalah terikat dengan prinsip Uberima Fide (utmost good faith) kepada Pemohon di mana pihak Responden harus membuat pendedahan sepenuhnya dan tepat kepada Pemohon berkenaan kesemua obligasi dan hak yang memungkinkan Pemohon akan bertanggungan susulan daripada perlindungan insuran yang dimasuki antara Pemohon dan Responden bagi motorsikal tersebut.

8. Saya juga dinasihati oleh Peguamcara Pemohon dan dengan sesungguhnya percaya bahawa bebab pendedahan penuh dan tepat oleh Responden adalah dari permulaan kontrak insuran dimasuki oleh Responden dan bebab itu akan berterusan sehingga tempoh kuatkuasa perlindungan insuran luput.

9. Saya juga dinasihati oleh Peguamcara Pemohon dan dengan sesungguhnya percaya bahawa Pemohon berhak untuk mengelak tanggungan (repudiate liability) untuk kemalangan tersebut berdasarkan fakta di atas.

10. Saya seterusnya dinasihati oleh Peguamcara Pemohon, dan dengan sesungguhnya percaya bahawa *polisi tersebut adalah menjadi tak sah (rendered void) atas alasan bahawa Responden telah membuat satu laporan polis palsu yang menyatakan bahawa motorsikal tersebut terlibat dalam kemalangan tersebut apabila pada hakikatnya motorsikal tersebut langsung tidak terlibat dalam kemalangan tersebut.*

11. Saya juga menegaskan bahawa Pemohon akan diprejudiskan sekiranya permohonan deklarasi ini tidak dibenarkan memandangkan Pemohon adalah terikat di bawah Seksyen 96(1) Akta Pengangkutan Jalan 1987 untuk bertanggungjawab bagi tuntutan Pihak Ketiga tersebut dalam kemalangan tersebut dan demikian akan menjadi mangsa.

12. Saya dengan sesungguhnya menyatakan bahawa *permohonan Pemohon untuk deklarasi ini harus di terima atas alasan bahawa Responden telah membuat satu laporan polis palsu dan sehubungan dengan ini telah memungkiri terma-terma kontrak insuran di antara Pemohon dan Responden.*

13. Berdasarkan fakta-fakta di atas, saya dengan segala hormatnya memohon

daripada Mahkamah Yang Mulia ini untuk satu perintah seperti yang dipohon di dalam Saman Pemula yang difailkan di sini.

NOTICE OF OS227 TO GDCO

[28] I turn now to the *pivotal document* which lies at the heart of this OS. It is a letter dated 26 May 2016, by which SGLCo. informed GDCo. that they had applied to the High Court for a declaration under s 96(3) of the RTA. I have earlier referred to this letter as the 's 96(3) Notice'. It is contended by the defendant that the letter from SGLCo to GDCo constitutes a valid notice for purposes of s 96(3) of the RTA and that it was properly and effectively served on the plaintiff, through GDCo. The letter from SGLCo dated 26 May 2016, which was *not sent or copied to the plaintiff*, reads as:

26 May 2016

Messrs G Dorai & Co

Advocates & Solicitors

No. 13A, Jalan Cempedak

Off Jalan Kovil Hilir

51100 Sentul

Kuala Lumpur

Dear Sirs

Selayang Sessions Court Suit No: A53KJ-436-09/2015

Mohamad Hairi Bin Mohamad Isa-vs-Mohamad Farid Bin Mohamad Naseri

We act for Allianz General Insurance Company (M) Bhd, the insurer of motorcycle No WTJ 894.

We wish to inform your goodselves that we had on 23.05.2016 filed an application in Kuala Lumpur High Court vide Originating Summons No WA-24NCC-227-05/2016 seeking an Order to declare that the insurance policy entered into between our client and the Defendant, the owner of motorcycle No WTJ 894, is void and unenforceable with respect to the accident on 13.12.2014 on the basis that there are elements of fraud involved.

Please take note that the said Originating Summons is fixed for *case management* on *07.06.2016*.

[29] After the s 96(3) notice was served on GDCo, the plaintiff did not intervene or appear in OS227. However, Farid (the insured) opposed OS227. On 26 August 2016, the High Court granted the declaratory order in OS227. The declaratory order reads as:

ATAS PERMOHONAN Pemohon yang dinamakan di atas *DAN SETELAH*

MEMBACA Saman Pemula bertarikh 23 Mei 2016 dan kesemuanya difailkan di sini *DAN SETELAH MENDENGAR* R. Ratha Davi peguam bagi pihak Pemohon dan Mohd Salehuddin Dato' Mohd Salleh peguam bagi pihak Responden *MAKA ADALAH DIPERINTAHKAN* bahawa:

1. Polisi No 14VKP055926 yang melindungi motorsikal No: WTJ 894 bagi tempoh 02.10.2014 hingga 01.10.2015 *adalah tak sah (void) dan tidak boleh dikuatkuasakan (unenforceable)* setakat perlindungan terhadap satu kemalangan jalanraya yang berlaku pada 13.12.2014 yang melibatkan motorsikal No: MBS 2604 dan motorsikal No: WTJ 894;

2. Selanjutnya, Pemohon tidak bertanggungjawab untuk menanggung sebarang perintah berikutan dengan tindakan Sivil di Mahkamah Sesyen Selayang Writ No: A53KJ-436-09/2015 dan/atau sebarang tuntutan lain yang berbangkit dari kemalangan jalanraya yang berlaku pada 13.12.2014 yang melibatkan motorsikal No: MBS 2604 dan motorsikal No: WTJ 894; dan

3. Responden membayar kos sebanyak RM700 kepada Pemohon.

[30] Thereafter, by letter dated 26 August 2016 SLGCo informed GDCo as follows:

We refer to the above matter and to our earlier letter dated 26.05.2016. Please take note that on 26.08.2016, we had obtained an Order for a declaration that:

(i) the motor policy issued by our client with respect to motorcycle No WTJ 894 for the period 02.10.2014 to 01.10.2015 is void and unenforceable with respect to the accident on 13.12.2014 involving your client's motorcycle No MBS 2604; and

(ii) our client is not liable to satisfy any order granted in the above suit.

We shall forward a copy of the sealed Order once the same is extracted from court. Accordingly, we put you on notice that our client is not responsible to satisfy any Judgment/Order obtained against the Defendant in the above suit.

Meanwhile, if your goodselves decide to proceed with recovery action against our client in the above suit, we have instructions to accept service.

We further put your goodselves on notice not to initiate any winding-up proceedings against our client for the purposes of executing any Judgment/Order that may be obtained in the above suit. In the event that you do so, we will produce this letter in court to show that you have been put on notice.

[31] On 13 September 2016, the sealed copy of declaratory order was served on GDCo. Subsequently, the defendant instructed KSCo to discharge themselves from acting for Farid (the insured) in Suit 436. The defendant also filed an application to remove their name as an intervener/co-defendant in Suit 436. The plaintiff opposed the defendant's application and in the course of exchange of affidavits, the declaratory order was explicitly referred to by the

plaintiff's counsel, Mr M Sooriabalan who affirmed an affidavit on behalf of the plaintiff, wherein he stated:

> 8. *Saya juga dengan rendah diri merujuk kepada Perintah Mahkamah Tinggi bertarikh 26.08.2016 dan menyatakan bahawa perintah ini sahaja tidak mencukupi bagi defendan/pencelah untuk mengelak pembayaran kepada Plaintif.*
>
> 9. *Selain daripada memperolehi perintah daripada Mahkamah Tinggi, defendan/pencelah perlu memenuhi beberapa lagi syarat mengikut keperluan undang-undang yang belum lagi dilakukan oleh mereka dan plaintif, sewaktu perbicaraan penuh akan menunjukkan kepada Mahkamah Yang Mulia ini bahawa Pencelah/defendan masih akan bertanggungan kepada tuntutan plaintif, walaupun terdapatnya Perintah Mahkamah Tinggi bertarikh 26.08.2016.*
>
> 10. Saya sesungguhnya percaya bahawa permohonan ini adalah satu percubaan oleh Allianz General Insurance Company (M) untuk mengelak liabiliti melalui pintu belakang.
>
> 11. Secara ringkasnya, saya ingin menyatakan bahawa ianya adalah mustahil untuk seseorang defendan untuk mengeluarkan dirinya sebagai pihak dalam suatu prosiding.
>
> 12. Saya juga menyatakan bahawa tiada prejudis kepada pencelah/defendan sekiranya permohonan ini tidak dibenarkan oleh kerana jika Allianz General Insurance Company (M) Bhd berpendapat bahawa perintah Mahkamah Tinggi adalah mencukupi, mereka boleh menggunakan perintah tersebut sebagai keterangan sewaktu perbicaraan penuh di Mahkamah Yang Mulia ini.
>
> 13. Dengan adanya peluang sebegini, ianya adalah agak mencurigakan mengapa permohonan ini difailkan dan saya sesungguhnya percaya bahawa sekiranya saksi-saksi defendan/pencelah memberi keterangan di Mahkamah Yang Mulia ini, ianya akan memihak kepada plaintif dan itulah sebabnya permohonan ini difailkan.

[32] In the proceeding before this court, the defendant points to Mr Sooriabalan's affidavit as a manifestation of an express or tacit admission by the plaintiff that he had knowledge of OS227 and the declaratory order. However, the plaintiff's answer or response to the defendant's suggestion that there was proper service of the s 96(3) notice on the plaintiff or that the plaintiff had knowledge of OS227 and of the declaratory order, may be gleaned from the following paragraphs of the plaintiff's affidavit in reply affirmed on 26 September 2018 where he said:

> 5. Saya merujuk kepada perenggan 6 Afidavit Sokongan tersebut dan saya sesungguhnya percaya bahawa *Defendan telah menyerahkan notis tersebut kepada Tetuan G Dorai & Co dan bukan kepada saya secara sendiri oleh yang demikian notis tersebut tidak sah memandangkan Defendan telah gagal untuk memenuhi syarat-syarat yang diperuntukan di bawah Seksyen 96(3) Akta Pengangkutan Jalan 1987 dan juga peruntukan penyerahan notis seperti yang diperuntukkan dibawah Akta Pengangkutan Jalan 1987.*
>
> 6. Saya merujuk kepada perenggan 7 (i) dan (ii) dan 8 Afidavit Sokongan tersebut

dan saya menegaskan bahawa *memandangkan tiada sebarang notis yang diserahkan kepada saya, maka saya tidak memberi arahan kepada Tetuan G Dorai & Co untuk mewakili saya dalam tindakan Saman Pemula tersebut.*

Oleh yang demikian, tiada sebarang tindakan yang diambil oleh Tetuan G Dorai & Co untuk mengenepikan perintah deklarasi tersebut.

7. Saya merujuk kepada perenggan 9 Afidavit Sokongan tersebut dan mengulangi perenggan 6 di atas dan menegaskan bahawa *memandangkan Defendan tidak menghantar notis tersebut kepada saya, maka saya tidak memberikan arahan kepada Tetuan G Dorai & Co untuk mewakili saya dalam tindakan berkenaan dengan Saman Pemula tersebut*.

[33] Thereafter, the plaintiff proceeded with the running-down claim via Suit 436. On 22 December 2016, the sessions court judge in Suit 436 held that the insured ie the rider of motorcycle No WTJ 894, was 100% liable for the accident which occurred on 13 December 2014 and allowed the plaintiff's claim for the general and special damages together with interest and costs. The order dated 22 December 2016 in Suit 436 reads as follows:

a. Defendan hendaklah membayar kepada Plaintif wang gantirugi am berjumlah *RM110,000 (RINGGIT MALAYSIA: SATU RATUS SEPULUH RIBU)* sahaja dengan faedah 5% setahun dari tarikh penyampaian saman (9 Oktober 2015) sehingga tarikh penghakiman (22 Disember 2016) sahaja dan;

b. Defendan hendaklah membayar kepada Plaintif wang gantirugi kos rawatan masa hadapan berjumlah *RM21,000 (RINGGIT MALAYSIA: DUA PULUH SATU RIBU)* sahaja dan tanpa faedah;

c. Defendan hendaklah membayar kepada Plaintif wang gantirugi kesakitan dan penderitaan sewaktu menjalani pembedahan masa hadapan berjumlah *RM5,000 (RINGGIT MALAYSIA: LIMA RIBU)* sahaja dan tanpa faedah;

d. Defendan hendaklah membayar kepada Plaintif wang gantirugi khas berjumlah *RM7,672 (RINGGIT MALAYSIA: TUJUH RIBU ENAM RATUS TUJUH PULUH DUA)* sahaja dengan faedah 2.5% setahun dari tarikh kemalangan (13 Disember 2014) sehingga tarikh penghakiman (22 Disember 2016) sahaja dan;

e. Defendan hendaklah membayar kepada Plaintif wang gantirugi khas kos kehilangan pendapatan sebenar berjumlah *RM52,800 (RINGGIT MALAYSIA: LIMA PULUH DUA RIBU LAPAN RATUS)* sahaja dengan faedah 2.5% setahun dari tarikh kemalangan (13 Disember 2014) sehingga tarikh penghakiman (22 Disember 2016 sahaja dan;

f. Defendan hendaklah membayar kepada Plaintif wang gantirugi khas kos kehilangan pendapatan masa hadapan berjumlah *RM278,400 (RINGGIT MALAYSIA: DUA RATUS TUJUH PULUH LAPAN RIBU EMPAT RATUS)* sahaja dengan faedah 2.5% setahun dari tarikh kemalangan (13 Disember 2014) sehingga tarikh penghakiman (22 Disember 2016) sahaja dan;

g. Defendan hendaklah membayar kepada Plaintif faedah sebanyak 5% setahun ke atas keseluruhan jumlah penghakiman dari tarikh keputusan sehingga tarikh

pembayaran penuh dan jumlah penghakiman dan;

h. Atas permintaan Plaintif keseluruhan jumlah penghakiman dibayar ke dalam akaun pelanggan Tetuan G. Dorai & Co.

i. Defendan juga hendaklah membayar kepada Peguamcara Plaintif kos sebanyak *RM21,172 (RINGGIT MALAYSIA: DUA PULUH SATU RIBU SATU RATUS TUJUH PULUH DUA)* sahaja.

[34] In this OS, the plaintiff contends that the declaratory order is void and unenforceable against the plaintiff and that the defendant is not allowed to rely on the declaratory order to deny the plaintiff's rights to recover the judgment sum from the defendant under s 96(1) of the RTA as the defendant had failed to effect service of the s 96(3) notice.

[35] It may be recalled that s 96(3) of the RTA provides, inter alia, as follows:

(3) No sum shall be payable ... *unless*, before or within seven days after the commencement of that action, *he has given notice to the person who is the plaintiff in the said proceedings* ...

SECTION 118 OF THE RTA

[36] The plaintiff also relies on s 118 of the RTA which provides that any notice to be given under the RTA (including the s 96(3) notice) must be served by any one of the methods prescribed by that section. It reads as follows:

118 Service of notices

(1) *Any notice required to be given or served under this Act, may, unless some other form of service is prescribed, be served on the person affected thereby as follows*:

(a) by giving the original copy of the notice personally to such person;

(b) by affixing a copy of the notice on any conspicuous part of the house or any other place such person usually resides;

(c) by affixing a copy of the notice on any conspicuous part of such person's motor vehicle; or

(d) by sending the notice through registered post.

(2) Where a notice is served by registered post, it shall be deemed to have been served on the day succeeding the day on which the notice would have been received, in the ordinary course of post, if the notice is addressed —

(a) in the case of a company incorporated in Malaysia, to the registered office of the company;

(b) in the case of a company incorporated outside Malaysia, either to the individual authorized to accept service of process under the Companies Act 1965, at the address filed with the Registrar of

A Companies or to the registered office of the company, wherever it may be situated;

(c) in the case of an individual or a body of persons, to the personal address kept in the Director's register under sections 8 and 27a.

B (3) Where the person to whom there has been addressed a registered letter containing any notice which may be given under this Act is informed of the fact that there is a registered letter awaiting him at a post office, and such person refuses or neglects to take delivery of such registered letter, such notice shall be deemed to have been served upon him on the date on which he was so informed.

C (4) [Deleted by Act A1391].

Provided that any notice in writing under this Act to any person to furnish particulars to the Director General, or any notice under this Act requiring the attendance of any person or witness before the Director General, shall

D be signed by the Director General or by any person authorized by him as aforesaid.

[37] The plaintiff contends that service of the s 96(3) notice on GDCo is not

E service on the plaintiff for purposes of s 96(3) of the RTA and that the defendant had failed to serve the s 96(3) notice to the plaintiff and specifying in that notice, the grounds on which the defendant proposes to rely on in seeking the declaratory order. It is not in dispute that the defendant had only served the s 96(3) notice on GDCo who at the material time, was only

F representing the plaintiff in Suit 436. The plaintiff claims that apart from Suit 436, he had never given any instructions to GDCo. to represent him in any other suit or legal proceedings. The plaintiff relies heavily on *Gobi*'s case where the High Court had allowed the application by the plaintiff in that case to set aside a similar declaratory order that was made under s 96(3) of the RTA.

G In *Gobi*'s case, the notice under s 96(3) of the RTA was served on the solicitors who were acting for the plaintiff in the running down action and the High Court ruled that there was non-compliance with s 96(3) of the RTA and s 188 of the RTA. The High Court followed *Badiaddin*'s case and held that there was non-compliance with the statutory requirements under s 96(3) of the RTA and

H s 118 of the RTA, which rendered the declaratory order as a nullity and was accordingly set aside.

[38] The decision of the High Court in *Gobi*'s case was upheld by the Court

I of Appeal. However, to-date, the Court of Appeal has not furnished any grounds of judgment in respect of the decision. The plaintiff draws an analogy with *Gobi*'s case and similarly contends that the defendant had clearly failed to serve the 96(3) notice on the plaintiff as required under s 96(3) of the RTA for purposes of OS227. Hence, it is contended that the declaratory order is void and unenforceable.

[39] The defendant's response is that the plaintiff in Suit 436 was at the material time represented by GDCo. As such, the defendant served the s 96(3) notice on GDCo. Accordingly, it is the defendant's contention that they had complied with the proviso to s 96(3) of the RTA. Alternatively, it was argued that if the defendant has contravened the proviso to s 96(3) of the RTA, it is then necessary to ask whether the contravention is of such a serious nature that warrants the setting aside of the declaratory order.

[40] In amplification, the defendant states that the following matters should be taken into consideration:

(a) when OS227 was filed on 23 May 2016, the solicitors for the defendant had given the s 96(3) notice to GDCo ie the solicitors who were representing the plaintiff in Suit 436;

(b) when the declaratory order was obtained on 26 August 2016, GDCo was informed of the same via the defendant's solicitors letter dated 26 August 2016;

(c) further, via letter dated 8 September 2016, the defendant's solicitors forwarded a copy of the sealed declaratory order to GDCo; and

(d) the defendant filed an application in Suit 436 on 2 November 2018 to remove their name as a party. The plaintiff had filed an affidavit to oppose the said application wherein reference was made to the declaratory order. The said affidavit was affirmed by M Sooriabalan who was acting for the plaintiff and authorized by the plaintiff to affirm the said affidavit.

[41] Based on the above, it was submitted for the defendant that at all material times the plaintiff and the plaintiff's solicitors were aware of OS227. As such, there is no injustice caused to the plaintiff. Hence, it was argued that the declaratory order ought not to be set aside even if the court finds that the defendant has contravened the proviso to s 96(3) of the RTA.

[42] In this regard, the defendant relied on *Badiaddin*'s case wherein it was held:

> [1] It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. The one special exception to this rule is where the final judgment of the High Court can be proved to be null and void on the ground of illegality or lack of jurisdiction. Apart from the breach of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened any written law, *the contravention should be one which defies a substantive statutory prohibition* so as to render the defective order null and void on the ground of illegality or lack of jurisdiction. The discretion to invoke the inherent discretion should also be exercised judicially in exceptional cases, where *the defect is of such a serious nature* that

there is a real need to set aside the defective order to enable the court to do justice. (Emphasis added.)

[43] It was emphasised for the defendant that at all times, the plaintiff and the plaintiff's solicitors ie GDCo had full knowledge of OS227 and did not take any steps to be made a party to OS227. It was also submitted that the plaintiff failed to exercise his statutory legal rights at the material time to intervene in OS227. The defendant contends that the plaintiff's action in choosing not to abide by the provisions of s 96(3) of the RTA to be made a party in OS227 and in belatedly filing this action against the defendant is an abuse of process of court.

[44] It was therefore contended for the defendant that the filing of this OS is an attempt by the plaintiff to have a second bite at the cherry and the plaintiff is estopped from impugning the declaratory order.

ANALYSIS AND CONCLUSION

[45] I start by setting out the principle that was established by the Federal Court in *Badiaddin*'s case. The principle may be culled from the judgment of Azmi FCJ where he said (p 409):

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.
>
> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:
>
> > The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in

> collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[46] The judgment of Gopal Sri Ram JCA (as he then was) explains the principle (pp 425–426) in the following words:

> It is true, as a general rule, that orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. The decision of the Judicial Committee of the Privy Council in *Isaacs v Robertson* [1985] AC 97 affirms the existence of the rule. There, Lord Diplock when delivering the advice of the Board said (at pp 102–103):
>
> > Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v Marsh* [1945] AC 271 at p 284 and *MacFoy v United Africa Co Ltd* [1962] AC 152 at p 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category of orders of such a court which a person

affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it upon application to that court; if it is regular, it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.

It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v Robertson* is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

[47] I turn now to *Gobi*'s case. In that case, the plaintiff was represented in the running-down action by the firm of Messrs Sodhi Chambers. The insurer applied for a declaration under s 96(3) of the RTA. The solicitors for the insurers served the statutory notice on Messrs Sodhi Chambers. *There was no separate service on the plaintiff.* The plaintiff later applied to set aside the declaratory order. The High Court agreed with the plaintiff and set aside the declaratory order. It is relevant and necessary to refer to the following passages in *Gobi*'s case:

Did plaintiff have knowledge of Suit 373 but refused to join as party?

[34] The defendant alleged that the filing of this instant suit to impeach the Order is an abuse of court process because the plaintiff had knowledge of the commencement of Suit 373 by the defendant but the plaintiff refused to be made a party in that Suit 373. As stated earlier, the defendant filed Suit 373 on 6 September 2016 and gave notice of the same to the plaintiff's solicitors the day after on 7 September 2016. The plaintiff simply failed to exercise his statutory right to be made a party under Section 96(3) of the RTA despite the notice. Thus the instant suit, according to the defendant, is also an abuse of the process of the Court.

[35] I cannot agree with the position taken by the defendant. Section 96(3), as set out earlier, clearly states that for the declaration (for the insurer) to be effective, notice must be given to the person who is the plaintiff in the underlying proceedings on accident liability before or within seven days after the date of the action. Here it was given a day after. But it was given to Messrs Sodhi Chambers. Not to the plaintiff personally. This fact is not in dispute.

...

[38] The issue then is whether notice to Messrs Sodhi Chambers could be deemed good notice to the plaintiff. My answer is in the negative by reason of the clear provision of Section 118(1) of the RTA on service of notice, the relevant parts of which read:

> (1) Any notice required to be given or served under this Act may, unless some other form of service is prescribed, be served on the person affected thereby as follows:
>
> (a) by giving the original copy of the notice personally to such person;
>
> (b) by affixing a copy of the notice on any conspicuous part of the house or any other place such person usually resides;
>
> (c) by affixing a copy of the notice on any conspicuous part of such person's motor vehicle; or
>
> (d) by sending the notice through registered post.

[39] In the instant case, the defendant could not show that the notice had been either personally served on the plaintiff under (a) or that, the said notice of Suit 373 had been sent by registered post under (d) to the plaintiff's own address as against that of Messrs Sodhi Chambers. Neither has it been shown that the notice was affixed at his house or on his motor vehicle under items (b) or (c).

...

[44] *I reiterate that in my view, notice to Messrs Sodhi Chambers could not be deemed good notice to the plaintiff himself because the provisions of Section 96(3) and Section 118(1) of the RTA on service of notice must be strictly complied with.*

[45] I should refer to the leading authority in the Federal Court decision in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC) which permits the setting aside of a High Court judgment on account of among others, it having been made in breach of legislation. Gopal Sri Ram JCA (as he then was) held thus:

> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v Robertson* is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. *But where an order of such a court is made in breach of statute, it is made without*

> *jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.*
>
> ...
>
> [47] It is to be readily appreciated that in the above case, the critical basis for the decision was that there was no breach of statute. In the instant case, I have established that absence of evidence of personal notice to the third party breaches the mandatory notice requirements of Section 96(3) read with Section 118 of the RTA.
>
> ...
>
> [50] The notice requirement as spelt out in Section 118 is a necessary pre-requisite to the application of a declaration under Section 96(3). *The onus is on the insurer to demonstrate that notice has been served on the third party in accordance with* Section 118 of the RTA. Without it, no such declaration can be lawfully given. (Emphasis added.)

[48] Based on the observation of the High Court in *Gobi*'s case, it is my view that since the s 96(3) notice in the present case was only served on GDCo, it follows that there was *no separate service on the plaintiff* as required by s 96(3) of the RTA read with s 118 of the RTA.

[49] As such, since service here was not in compliance with s 96(3) of the RTA (read with s 118 of the RTA), there was therefore a contravention of written law and the declaratory order dated 26 August 2018 in OS277 is consequently a nullity within the scope of that principle as established by the Federal Court in *Badiaddin*'s case.

[50] In view of my finding as above, it follows that the insurers plea that GDCo. and by extension, the plaintiff, had 'knowledge' of the s 96(3) notice and was aware of the declaratory order, cannot be relied upon as a basis to preclude the plaintiff from challenging the validity of the declaratory order. In this regard, it is important to recall Gopal Sri Ram JCA's judgment at p 429 in *Badiaddin*'s case where he declared that if the order is a 'nullity' and made without jurisdiction, then there is no scope for '*res-judicata*' or '*functus officio*'. I would think that by parity of reasoning, the plea of estoppel cannot likewise be taken against an order which is a nullity and/or one which is made without jurisdiction. In my view, estoppel, acquiescence or waiver, does not and cannot operate when there is a lack of jurisdiction.

[51] Indeed, it is also relevant to mention that that there is no estoppel against a statutory provision. In *Puran Singh v Kehar Singh & Anor* [1939] 1 MLJ 71, the court (per Thomas CJ) said (p 75):

The main question argued at the appeal was that the learned trial Judge having held that the registration of Kehar Singh as proprietor of certain lands had been obtained by means of an insufficient or void instrument, viz., an invalid power of attorney, and that it was in consequence void under section 42 (iii) of the Land Code, he was wrong in holding that the plaintiff was estopped by his conduct from objecting to the registration. In support of this contention he cited *Borrow's case* (1880) 14 ChD 432 in which it is stated by Bacon, VC, in the course of his judgment that:

the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.

This view is followed in the case of *Abdul Aziz v Kanthen Mallik* 38 ILR Cal 512 515 in which at page 515 a long list of authorities has been set out. The Court there decided that it was not prepared to accede to the argument that the principle of estoppel overrides the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act.

[52] In *Veetak Enterprise Sdn Bhd v Kuala Lumpur Finance Bhd* [1987] 1 MLJ 407, Gun Chitt Tuan J said (p 40):

It was another submission of counsel for the plaintiff that the defendant could not raise the issue of estoppel and he referred to the former Court of Appeal case of *Puran Singh v Kehar Singh & Anor* [1939] MLJ 71 75. In that case reference was made by Thomas CJ to *Barrow's case* (1880) 14 Ch D 432 in which was stated by Bacon, VC in the course of his judgment that:

> the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.

It was held by the former Court of Appeal, inter alia, *that there can be no estoppel against statutory provision in an Enactment which legislates on a matter of general interest.* (Emphasis added.)

[53] Lastly, in *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404 (SC), the Supreme Court (per Hashim Yeop A Sani CJ) said (p 407):

On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. *There can be no estoppel as against statutory provisions.* (Emphasis added.)

[54] Turning to the issue of delay, I do of course accept that there was delay on the plaintiff's part in seeking to impugn the declaratory order but delay is merely a building block for a plea of 'waiver', which, based on the *Badiaddin* principle, does not and cannot preclude the plaintiff from applying to set aside the impugned declaratory order.

[55] I turn next to the point raised by the defendant, that non-service on the plaintiff was not fatal as s 96(3) of the RTA is merely procedural and not a substantive statutory right and/or that non-service was not a serious infraction of the statutory provision. It is of course tempting to conclude that service of notice is a mere matter of procedure. However, given that a declaration under s 96(3) of the RTA will result in very serious financial and/or adverse consequences to the injured party particularly if that party ends up with a 'paper judgment', it cannot be said that the requirement for service on the plaintiff, is a mere matter of procedure. It is far more than that.

[56] Thus, when seen in its proper context and when the consequences of the declaration to nullify the policy are properly considered and appreciated, it becomes apparent that a declaration under that section becomes lethal to any judgment that is obtained by an injured victim against the insured. Hence, it may properly be described as a *procedural provision which affects substantive rights of a third party*. Hence, service under s 96(3) of the RTA in the manner as prescribed in s 118 of the RTA is mandatory and it will not suffice if the statutory notice is given to the plaintiff's solicitors who may ordinarily, be the 'agent' of their client.

[57] In this instance the statute has prescribed that there must be service on the plaintiff and the mode of such service must be in accordance with s 118 of the RTA. Hence, the defendant was obliged to take the prescribed route of effecting service of the s 96(3) notice on the plaintiff in the manner prescribed by s 118 of the RTA. Thereafter, it would be up to the plaintiff whether to intervene and/or to oppose OS227. No doubt, the fact that the plaintiff's solicitor, M Sooriabalan affirmed an affidavit in the running-down action and had alluded to the declaratory order, must mean that the plaintiff's solicitor and by extension, the plaintiff, was aware of the declaratory order. In ordinary circumstances, I would agree that an estoppel will operate against a party who is aware of on-going legal proceedings which he knows will affect his legal rights and where he does not intervene in those proceedings. This is established in the following cases:

(a) *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95; [1957] 3 All ER 559; [1957] 3 WLR 830 (PC);

(b) *Khoo Cheng Yee v Khoo Teng Seong & Ng Seng Kiok & Ors* [1992] 2 CLJ Rep 643; [1992] 4 CLJ 2140 (HC).

[58] But, the factual situation here is one which is not ordinary. Rather, it is one where there is a mandatory statutory provision in operation which must be strictly complied with.

[59] As explained earlier, the doctrine of estoppel cannot operate in this

situation. Thus, the fact that the plaintiff had indirect knowledge of OS227 through his solicitors and/or that the plaintiff did not take any steps earlier to intervene in OS227 is neither here nor there. It basically amounts to nothing.

[60] On a final note, I do not accept that the failure to comply with s 96(3) of the RTA read together with s 118 of the RTA can be described as not being a serious matter merely by reason of the 96(3) notice having been served on the plaintiff's solicitors. The defendant's arguments in this regard is akin to saying that there has been a semblance of compliance. Ultimately, it all boils down to whether the statutory provision has been complied with, or not. There are no two ways about it.

[61] Before I conclude I should add that I am fully cognisant of the importance of s 96(3) of the RTA which enables insurers to avoid liability to pay on a judgment which is predicated on a fraudulent claim. However, it is in my view, imperative and axiomatic that s 96(3) of the RTA, which allows the insurer to obtain a declaration which deprives the plaintiff of a statutory right to seek payment of a judgment under s 96(1) of the RTA, be fully and strictly complied with. In this case, there was non-compliance with the statutory provision, which, according to *Badiaddin*'s case (as applied in *Gobi*'s case) renders the declaratory order as null and void.

[62] In the upshot, for the reasons as discussed above, I am of the view that the declaratory order dated 26 August 2016 is a nullity. I therefore granted order in terms of encl 1 and allowed prayers (1), (2), (3), (4) and (5) of this OS. The defendant was ordered to pay costs of RM5,000 (subject to 4% allocator). Enclosure (5) was withdrawn and was accordingly struck off with no order as to costs.

Order accordingly.

Order in terms of encl 1 granted and encl 5 struck off.

Reported by Ahmad Ismail Illman Mohd Razali